Supreme Court, U.S.
FILED

931964 MAY 31 1994

OFFICE OF THE CLERK

No. 93-

In The
Supreme Court of the United States
October Term, 1993

AMERICAN BONDING COMPANY,
Petitioner,

v.

TRUSTEES OF THE CARPENTERS FOR SOUTHERN NEVADA HEALTH AND WELFARE TRUST; TRUSTEES OF THE CONSTRUCTION INDUSTRY AND CARPENTERS JOINT PENSION TRUST FOR SOUTHERN NEVADA; TRUSTEES OF THE VACATION TRUST CARPENTERS UNION NO. 1780 AND TRUSTEES OF THE SOUTHERN NEVADA CARPENTERS AND MILLWRIGHTS APPRENTICESHIP TRAINING TRUST,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

RICHARD D. YOUNG
BELL AND YOUNG, LTD.
4001 Meadows Lane
Las Vegas, Nevada 89107
(702) 878-2800

Attorney for Petitioner

45 pp

QUESTIONS PRESENTED

1. Whether the Employment Retirement Income Security Act of 1974 (ERISA), as a comprehensive federal statutory scheme, preempts Nevada law which allows ERISA pension trustees to recover fringe benefits under a Nevada state contractor's licensing bond of a defaulting employer.

2. Whether the decision of the Nevada Supreme Court to deny that preemption applies is a sufficient inroad to the federal statutory scheme to justify a writ directing reversal in favor of Petitioner.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTE PROVISIONS INVOLVED	2
STATEMENT OF GROUNDS	3
STATEMENT OF CASE	3
ARGUMENT	7
I. THAT THE EMPLOYMENT RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA), AS A COMPREHENSIVE FEDERAL STATUTORY SCHEME, PREEMPTS NEVADA LAW WHICH ALLOWS ERISA PENSION TRUSTEES TO RECOVER FRINGE BENEFITS UNDER A NEVADA STATE CONTRACTOR'S LICENSING BOND OF A DEFAULTING EMPLOYER.	
II. THAT THE DECISION OF THE NEVADA SUPREME COURT TO DENY THAT PREEMPTION APPLIES IS A SUFFICIENT INROAD TO THE FEDERAL STATUTORY SCHEME TO JUSTIFY A WRIT DIRECTING REVERSAL IN FAVOR OF PETITIONER.	
CONCLUSION	23
CERTIFICATE OF MAILING	25

TABLE OF AUTHORITIES

Cases: **Page**

Carpenter's Health and Welfare Fund v. Barry, 18 Cal.Rptr.2d 661, 13 C.A.4th 1406 (1993). 6, 11, 12

Carpenters So. Cal. Admin. Corp. v. L. El Capitan Development Co., 53 Cal.3d 1041, 282 Cal.Rptr. 277, 811 P.2d 296 (1991). 12, 13

Dytrt v. Mountain State Tel and Tel. Co., 921 F.2d 889 (9th Cir. 1990) 21

F.M.C. Corp. v. Holliday, 498 U.S. 52, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990) 20, 22

Genix Supply Co. v. Board of Trustees, 84 Nev. 246, 438 P.2d 816 (1968). 9, 10, 13

Marcoz v. Summa Corp., 106 Nev. 373, 801 P.2d 1346 (1990) 8

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 107 S.Ct. 1542, 95 L. Ed.2d 55 (1987) 15, 16

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987). 15, 16, 19

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) 6, 17, 18, 19

TABLE OF AUTHORITIES; Continued

Tobler and Oliver v. Board of Trustees,
84 Nev. 438, 442 P.2d 904
(1968) 10, 13, 14

Trustees of Electrical Workers Health
and Welfare Trust v. Marjo Corp.,
988 F.2d 865 (9th Cir. 1993) . 6,14,21,22

STATUTES

NRS 613.125 9
NRS 608.150 14
NRS 624.270 10
NRS 624.273 8

TABLE OF APPENDICES

APPENDIX

A. ORDER DISMISSING APPEAL of the Supreme Court of the State of Nevada in American Bonding Company v. Trustees of the Carpenters for Southern Nevada Health and Welfare Trust, et al., #24106, filed January 20, 1994

B. ORDER DENYING REHEARING of the Supreme Court of the State of Nevada in American Bonding Company v. Trustees of the Carpenters for Southern Nevada Health and Welfare Trust, et al., #24106, filed March 7, 1994

C. STATUTES

NRS 613.125
NRS 624.270
NRS 624.273

OPINION BELOW

The opinion of the Supreme Court of Nevada, dated January 20, 1994, is unreported as it was an order dismissing appeal and is reproduced at Appendix A, page 1 to this Petition.

The order denying rehearing of the Supreme Court of Nevada, dated March 7, 1994, is reproduced as Appendix B, page 1.

JURISDICTION

The decision and order of the Nevada Supreme Court was entered January 20, 1994 affirming the judgment of the trial court entered November 6, 1992, which judgment granted Respondents' counter motion for summary judgment. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL AND STATUTE PROVISIONS INVOLVED

This case involves portions of Article VI of the Constitution of the United States, as well as 29 U.S.C. Section 1144(a), which provide as follows:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Article VI.

> Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section IV(a) and not exempt under section IV(b).

29 U.S.C. Section 1144(a) aka Section 514(a) of Employment Retirement Income Security Act ("ERISA").

STATEMENT OF GROUNDS

1. In its decision, dated January 20, 1994, the Nevada Supreme Court has decided an important question of federal law in a way that conflicts with applicable decisions of the Appellate Courts of the sister state of the State of California.

2. In its decision, dated January 20, 1994, the Nevada Supreme Court has decided an important question of federal law in a way that conflicts with applicable decisions of the United States Court of Appeals for the Ninth Circuit, which is the controlling Court of Appeals for the State of Nevada.

STATEMENT OF THE CASE

The names of all parties in this case appear in the caption of the case.

The Trustees of several fringe benefit trust funds ("Trustees") representing carpentry construction workers employed in southern Nevada, administer health and

pension benefits for such union employees. The trustees filed suit seeking recovery of such fringe benefits from National Forest Products, Inc. ("National") [which sought and obtained bankruptcy protection]. Trustees joined Petitioner American Bonding Company ("American") in the suit alleging that National had breached a provision of the collective bargaining agreement which obligated National to make contributions to the carpentry's benefit trust funds on behalf of its employees. The trustees claimed that American, as the surety which issued National's contractor licensing bond, pursuant to Nevada statute, must forfeit the proceeds of the licensing bond to the trustees to cover the trust fund contributions which National had failed to make. The trustees also pursued a private company, Beal's Royal Glass & Mirror Company ("Beal's"), based upon an indemnification

agreement between Beal's and National filed with the State Contractors Licensing Board. The amount of the American bond was $20,000 and the amount of the damages sought against Beal's was unspecified.

American Bonding Company moved for summary judgment in the state district court asserting that the trustees' claims were preempted by ERISA. Trustees opposed the motion and filed a countermotion for summary judgment based upon the bond language and statutory/case law of Nevada relating to contractors licensing bonds. Beal's also moved for summary judgment against trustees. By order dated November 6, 1992, the district court judge issued its order granting the trustees' countermotion for summary judgment against American Bonding Company and ordering American to pay the proceeds of the licensing bond to trustees; the district court denied the motion for

summary judgment against Beal's.

The case was then appealed to the Nevada Supreme Court and argued on briefs and oral argument. American Bonding Company argued, in part, that, under the authority of Carpenter's Health and Welfare Fund v. Barry, 18 Cal.Rptr.2d 661, 13 C.A. 4th 1406 (1993) and Trustees of Electrical Workers Health and Welfare Trust v. Marjo Corp., 988 F.2d 865 (9th Cir. 1993), the state contractors licensing bond statutes and Nevada judicial decisions interpreting these statutes were preempted by ERISA. The Nevada Supreme Court, citing footnote No. 21 in Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100, 103 S.Ct. 2890, 2901, 77 L.Ed. 2d 490 (1983), concluded that the Nevada contractor licensing statutes are only remotely related to ERISA and, therefore, not preempted. The Nevada Supreme Court, therefore, confirmed the trial court's grant

of summary judgment on the federal question.

ARGUMENT

I. THAT THE EMPLOYMENT RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA), AS A COMPREHENSIVE FEDERAL STATUTORY SCHEME, PREEMPTS NEVADA LAW WHICH ALLOWS ERISA PENSION TRUSTEES TO RECOVER FRINGE BENEFITS ON A NEVADA STATE CONTRACTOR'S LICENSING BOND OF A DEFAULTING EMPLOYER.

Under Section 514(a) of ERISA, the federal statutes supersede any state laws "insofar as they may now or hereafter relate to any employee benefit plan". Thus, the fact that the Nevada state law discussed below was in effect prior to enactment of ERISA does not affect the analysis that ERISA supersedes any state laws which relates to an employee benefit plan.

Under ERISA, the term "state law" is defined broadly enough to encompass "almost

any imaginable legislative, judicial, or administrative action a state might take". Marcoz v. Summa Corp., 106 Nev. 737, 743, 801 P.2d 1346 (1990). The Nevada Supreme Court thereby recognizes that whether a state statute specifically mentions ERISA plans or state judicial decisions interpret such a statute to mention ERISA plans beneficially or otherwise, makes no difference.

Under Nevada law, trustee pension plans, which are now covered by ERISA, became claimants under a contractors licensing bond by judicial decision. Under N.R.S. 624.273 (Appendix C, p. 10), a claimant is entitled to recover under a contractors license bond if damaged by failure of the contractor to perform under a construction contract and the claimant is: (1) an owner of property or (2) an employee of the contractor or (3) a supplier or

materialman for the contractor or (4) is injured by any unlawful act or omission of the contractor in the performance of such contract.

The primary Nevada case recognizing plan trustees as bond claimants was decided over twenty five years ago. In Genix Supply Co. v. Board of Trustees, 84 Nev. 246, 247, 438 P.2d 816 (1968), the Nevada Supreme Court held that a contractor who agrees to make payments to a health and welfare fund under a collective bargaining agreement or other agreement and willfully fails to make such payments, is acting unlawfully. Such payments are required by N.R.S. 613.125 (Appendix C, p. 8). Such an unlawful act makes trustees a claimant on a contractors licensing bond under N.R.S. 624.273(1)(d), as the trustees are injured by the unlawful act or omission of the contractor in his failure to make the payments. The same

court went on to hold that trustees recovering such fringe benefits were entitled to the same priority under the contractors licensing bond as the claim for labor of the employee who performed the work and, as such, held that the trustees were entitled to a preferred and first claim under the bond, pursuant to N.R.S. 624.270(4). The statute at that time stated: The claim of any employer of a contractor for wages shall be a preferred claim against any such bond or deposit. (This provision is now N.R.S. 624.273(6).)

In a companion case to Genix, the Nevada Supreme Court further determined that, pursuant to N.R.S. 608.150, a general contractor is liable for the employer contributions to ERISA plan contributions for subcontractors. See Tobler and Oliver v. Board of Trustees, 84 Nev. 438, 442 P.2d 904 (1968).

The above Nevada judicial decisions make such plan trustees priority claimants in pursuit of the recovery of plan contributions against a contractors licensing bond as their claims are to be treated as labor claims.

In Carpenter's Health and Welfare Fund v. Barry, 18 Cal. Rptr. 2d 661, 13 C.A. 4th 1406 (1993), the California First Appellate District, Justice Stein held that ERISA pre-empted the California contractors licensing bond provisions. The court recognized that, because the contractors licensing bond was a method for the collection of employer contributions, such a state statutory bond is a collection method of plan benefits "used to supplement or supplant the civil enforcement scheme developed by ERISA". Such statutes are "preempted because ERISA provides its own collection methods". Id. 18 Cal. Rptr. 2d at 663.

Justice Stein said that the remedies of ERISA represent exclusive remedies and supersede state laws which purport to create parallel remedies. The California Appellate Court held that preemption was required by the recent decision of the California Supreme Court, Carpenters So. Cal. Admin. Corp. v. L. El Capitan Development Co., 53 Cal.3d 1041, 282 Cal.Rptr. 277, 811 P.2d 296 (1991), which held that trustees could not utilize mechanic lien procedures to collect employee benefits. Similarly, the Barry court recognized that contractors licensing bond statutes relate to ERISA plans "by creating the mechanism for enforcing an employer's contribution obligations that Congress did not provide." Barry, 18 Cal. Rptr. at 662, citing El Capitan, 53 Cal. 3d at p. 1045. The Court further held it is irrelevant that the state statutes provide an additional beneficial remedy to the

trustees. The statutes are preempted "because ERISA provides its own collection methods". 18 Cal. Rptr. at 663.

The California Supreme Court, in El Capitan, 53 Cal. 3d at 1049, 282 Cal. Rptr. at 285, 811 P.2d at 304, recognized that trustees are not laborers or materialmen entitled to enforce a lien. In the absence of the creation of a substantive right against a third party by state law such a collection method would not exist. In the case at bar, abstent Nevada state law which grants trustees substantive rights to recover from a third party, this collection method would not exist. This is a supplemental method of collection under state law, not provided by ERISA.

While the Nevada authority for recovery of plan benefits under a contractor licensing bond as priority claimants is the Genix case, the companion case of Tobler and

Oliver v. Board of Trustees, discussed above, was the Nevada law at issue in a recent Ninth Circuit decision. That Court found a portion of the contractors licensing statutory scheme of Nevada to be preempted. N.R.S. 608.150(1), which allowed a general contractor to be assessed for fringe benefits not paid by a subcontractor, as approved in Tobler and Oliver, was held to be a state created method of collection and, thus, improper. In Trustees of Electrical Workers Health and Welfare Trust v. Marjo Corp., 988 F.2d 865, 867 (9th Cir. 1993), the Court noted:

> The Trustees are attempting to use the Nevada statute to enforce the terms of a plan. To the extent that the enforcement mechanism of the Nevada statutes supplements those provided by ERISA, it is preempted.

The Court further stated, 988 F.2d at 868:

> No one questions that Congress intended to facilitate collection actions against employers. At the same time, there seems to be no

> support for concluding that Congress intended to allow each state to expand liability for contribution to ERISA plans as it sees fit.

In light of the above, the Ninth Circuit adopted the broad language of the United States Supreme Court in recent decisions relating to the preemption issue, specifically citing Pilot Life Inc. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) and Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2 2d 55 (1987).

Therefore, for the Nevada Supreme Court to hold that the Nevada contractor licensing statutes are not preempted by ERISA, conflicts with the California interpretation of similar statutes pre-empting beneficial enforcement mechanisms which ERISA plans are no longer able to take advantage of. Further, such a decision is directly contrary to the position of the Ninth

Circuit Court of Appeals with regard to interpretation of preemption of federal law over similar Nevada statutes in the Nevada contractors licensing statutory scheme.

II. THAT THE DECISION OF THE NEVADA SUPREME COURT TO DENY THAT PREEMPTION APPLIES IS A SUFFICIENT INROAD TO THE FEDERAL STATUTORY SCHEME TO JUSTIFY A WRIT DIRECTING REVERSAL IN FAVOR OF PETITIONER.

The Nevada Supreme Court's determination that Nevada's contractor licensing statutes are only remotely related to ERISA and are therefore not preempted by ERISA is a conclusion relying solely upon a footnote in a 1983 case of this Court which required preemption and is one basis for the broader recognition of the pre-emption statute in ERISA as later discussed in Pilot Life and Metropolitan Life. The Nevada Supreme Court relies upon footnote 21 in

Shaw v. Delta Air Lines, Inc., 463 U.S. at 100 and 103 S.Ct. at 2901, which indicated "some state actions" would affect ERISA plans "in too tenuous, remote or peripheral" a manner to find that the state law "relates to" a plan. The case cited in the footnote indicates "peripheral affect" is the garnishment of a spouse's pension income to enforce alimony and support orders. Disposition of individual plan participants' benefits for such traditional personal obligations is remote, but a general substantive state created method of collecting money to fund plan benefits is direct involvement with a plan.

In Shaw v. Delta Air Lines, Inc., supra, this Court recognized that a federal question is presented which federal courts have jurisdiction to resolve where state law is claimed to be preempted by a federal statute which, by virtue of the Supremacy

Clause of the Constitution, must prevail. 463 U.S. at 97 and 103 S.Ct. at 2899. This Court in Shaw, also recognizes the broad scope of ERISA and that the preemptive scope of ERISA is as broad as its language. 463 U.S. at 99 and 103 S.Ct. at 2901. A state law "relates to an employee benefit plan . . . if it has a connection with or reference to such a plan". Shaw, 463 U.S. at 97, 103 S.Ct. at 2900.

Subsequent to Shaw, this Court spoke strongly of the preemptive force of ERISA's provisions and the intent to provide exclusively federal remedies under the comprehensive federal scheme. The selection of certain remedies to the exclusion of other remedies under the broad statutory federal scheme would be undermined if participants/beneficiaries in ERISA plans were free to obtain remedies under state law that Congress did not include.

Thus, Justice O'Connor, speaking for a unanimous court, in Pilot Life Ins. Co. v. Dedeaux, supra, stated:

> We have observed in the past that the express pre-emption provisions of ERISA are deliberately expansive, and designed to "establish pension plan regulation as exclusively a federal concern". 481 U.S. at 46.

The Court further stated:

> The expectations that a federal common law of rights and obligations under ERISA-regulated plans will develop, indeed, the entire comparison of ERISA's Section 502(a) to Section 301 of the LMRA (Labor-Management Relations Act of 1947), would make little sense if the remedies available to ERISA participants and beneficiaries under Section 502(a) could be supplanted by varying state laws. 481 U.S. at 56.

The Court then went on to hold that the state common law actions were preempted under Section 514(a) of ERISA, the broad pre-emption provision.

For the Nevada Supreme Court to cite footnote 21 in Shaw v. Delta Air Lines, Inc., and, without further analysis,

conclude that Nevada's contractor licensing statutes are only remotely related to ERISA and are, therefore, not preempted, is difficult to assess.

There is no question that the Nevada law through statutory and judicial decisions relating to the trustees herein affects the collection methods for plan benefits. It is not a tenuous or distant connection. Nevada law provides supplemental collection methods not set forth in ERISA.

Far more tenuous is the determination that state laws purportedly granting rights to plans to subrogate against third party tortfeasors after paying benefits as the result of the tortfeasors' conduct are preempted. Yet, such state laws are pre-empted. F.M.C. Corp. v. Holliday, 498 U.S. 52, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990). Because the subrogation statute had failed to exclude employee benefit plans when

referring to any program or arrangement for payment of "benefits" (leaving the definition of benefits open-ended) the possibility of state regulation or administration existed. Such subrogation rights do not appear to present as broad a supplemental collection method as state contractor licensing bonds.

The Ninth Circuit Court of Appeals has identified four areas of state law that ERISA preempts: (1) regulation of the terms or types of plan benefits; (2) laws that create reporting, disclosure, funding or vesting requirements, (3) rules for benefit determinations or methods of calculation; or (4) remedies for misconduct in the administration of plans. Dytrt v. Mountain State Tel. and Tel. Co., 921 F.2d 889, 897 (9th Cir. 1990).

The Ninth Circuit in Trustees v. Marjo Corp., supra, recognized this Court's

opinion in F.M.C. Corp. v. Holliday, as part of the fabric of more recent cases concluding that:

> Together, these cases support a much broader reading of the ERISA pre-emption provision than we recognized in D & L Camp and Majestic Housing. 988 F.2d at 868.

The Ninth Circuit held, in Marjo Corp., that the Nevada contracting licensing statutes present a method of collection separate from those authorized in ERISA and require federal preemption.

> To the extent that the enforcement mechanism of the Nevada statute supplements those provided by ERISA, it is preempted. 988 F.2d at 867.

The primary issue is that the collection of plan benefits from a contractor licensing bond directly affects ERISA plans because it is a non-federal method of collection of plan benefits. The decision of the Nevada Supreme Court creates a direct conflict on an issue of federal law

with the determination of the Ninth Circuit Court of Appeals and California Appellate Courts. The Nevada Supreme Court has created the very diversity of interpretation of ERISA plan benefits for which the federal statutory comprehensive scheme with its development of federal common law was intended to prevent.

CONCLUSION

In ruling that the Nevada state contractor licensing bond statutes were too remote to affect a ERISA plan, the Nevada Supreme Court not only ignored the rulings of the federal Ninth Circuit and other states' determinations on the same issue, but has created the diversity and conflicting methods of collection of plan benefits which ERISA was intended to prevent.

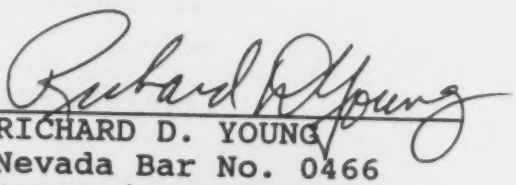
In failing to reverse the trial court's grant of summary judgment, the Nevada

Supreme Court has created an irreconcilable conflict on the federal issue of ERISA pre-emption.

Petitioner respectfully requests this Court to act immediately and reverse the erroneous determination by the Nevada Supreme Court by granting certiorari to conduct its own review of the record below.

Respectfully submitted this 20 day of May, 1994.

BELL AND YOUNG, LTD.

By 

RICHARD D. YOUNG
Nevada Bar No. 0466
DAVID K. ROSEQUIST
Nevada Bar No. 1453
4001 Meadows Lane
Las Vegas, Nevada 89107
(702) 878-2800

CERTIFICATE OF SERVICE

I, Sylvia Weber, secretary to Richard D. Young, do hereby certify that on this 20 day of May, 1994, I forwarded a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA, by first class mail, postage prepaid, upon:

Morris, Brignone & Pickering
300 S. Fourth Street, #1203
Las Vegas, Nevada 89101
Attorneys for Trustees

Clerk of Nevada Supreme Court
Capitol Complex
201 S. Carson Street
Carson City, Nevada 89710

Honorable Joseph T. Bonaventure
District Judge
Box 551601
Las Vegas, Nevada 89155-1601

Sylvia Weber

Sylvia Weber, Secretary

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 24106

AMERICAN BONDING COMPANY,
Appellant,

v.

TRUSTEES OF THE CARPENTERS FOR SOUTHERN NEVADA HEALTH AND WELFARE TRUST; TRUSTEES OF THE CONSTRUCTION INDUSTRY AND CARPENTERS JOINT PENSION TRUST FOR SOUTHERN NEVADA; TRUSTEES OF THE VACATION TRUST CARPENTERS UNION NO. 1780 AND TRUSTEES OF THE SOUTHERN NEVADA CARPENTERS AND MILLWRIGHTS APPRENTICESHIP TRAINING TRUST,
Respondents.

Files January 20, 1994

ORDER DISMISSING APPEAL

Appeal from a district court order denying a motion for summary judgment and granting a countermotion for partial summary judgment in an action brought upon a contractor's licensing bond. Trustees represent several trust funds which

administer health and pension benefits to union employees in Southern Nevada's carpentry industry. The trust funds at issue are covered by the Employment Retirement Income Security Act of 1974 ("ERISA")[1] On May 4, 1990, appellant American Bonding Company ("American") issued a $20,000.00 contractor's licensing bond on behalf of its principal, National Forest Products, Inc. ("National"). On March 12, 1992, Trustees sued American in district court, alleging that National had breached a provision of a collective bargaining agreement which obligated National to make contributions to the carpenters' benefit trusts on behalf of its employees. Trustees asserted that American, as a compensated surety for National (which had sought and

[1]ERISA is a comprehensive federal statutory scheme which regulates employee benefit plans. 29 U.S.C. § 1001-1461 (1988).

obtained bankruptcy protection), must forfeit the proceeds of the licensing board to Trustees to cover the trust fund contributions which National had failed to make. Trustees also sued Beal's Royal Glass & Mirror Company ("Beal's"), based on an indemnification agreement between Beal's and National filed with the State Contractor's License Board. Trustees sought $20,000.00 from American and an unspecified amount of damages from Beal's.

Following a joint case conference, American moved for summary judgment under NRCP 56, asserting that Trustees' claims were preempted by ERISA. Trustees opposed the motion and made a countermotion for summary judgment based upon the language of the bond and Nevada statutory and case law applying to compensated sureties. Beal's also moved for summary judgment against Trustees. On November 6, 1992, the district

court issued an order granting Trustees' countermotion for summary judgment against American and ordering American to pay the proceeds of the licensing bond to Trustees; the district court allowed Trustees' case against Beal's to proceed. This appeal followed.

The United States Supreme Court noted in Shaw v. Delta air Lines, Inc., 463 U.S. 85, 100 n.21 (1982), that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." (Citation omitted.) We conclude that Nevada's contractor licensing statutes are only remotely related to ERISA and are therefore not preempted by ERISA in cases such as the one at bar.

We have considered American's other contentions and conclude that they lack merit. Accordingly, we

ORDER this appeal dismissed.

/s/ Rose, C.J.

/s/ Stefen, J.

/s/ Young, J.

/s/ Springer, J.

/s/ Shearing, J.

cc: Hon. Joseph T. Bonaventure, Judge
Bell & Young
Morris, Brignone & Pickering
Loretta Bowman, Clerk

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 24106

AMERICAN BONDING COMPANY,
Appellant,

v.

TRUSTEES OF THE CARPENTERS FOR SOUTHERN NEVADA HEALTH AND WELFARE TRUST; TRUSTEES OF THE CONSTRUCTION INDUSTRY AND CARPENTERS JOINT PENSION TRUST FOR SOUTHERN NEVADA; TRUSTEES OF THE VACATION TRUST CARPENTERS UNION NO. 1780 AND TRUSTEES OF THE SOUTHERN NEVADA CARPENTERS AND MILLWRIGHTS APPRENTICESHIP TRAINING TRUST,
Respondents.

Filed March 7, 1994

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Rose, C.J.

/s/ Stefen, J.

/s/ Young, J.

/s/ Springer, J.

/s/ Shearing, J.

cc: Hon. Joseph T. Bonaventure, Judge
Bell & Young
Morris, Brignone & Pickering
Loretta Bowman, Clerk

APPENDIX C

STATUTES

The following are Nevada statutes:

1. NRS 613.125, which provides:

1. Whenever an employer has agreed with any employee to make payments to a health or welfare fund or other such plan for the benefit of the employees, or has entered into a collective bargaining agreement providing for such payments, it shall be unlawful for such employer willfully or with intent to defraud to fail to make the payments required by the terms of any such agreement.

2. Any employer who violates any provision of this section shall be guilty of a misdemeanor.

2. NRS 624.270, which provides:

1. Before issuing a contractor's license to any applicant, the board shall require that the applicant:

(a) File with the board a surety bond in a form acceptable to the board executed by the contractor as principal with a corporation authorized to transact surety business in the State of Nevada as surety; or

(b) In lieu of such a bond, establish with the board a cash deposit as provided in this section.

2. Before granting renewal of a contractor's license to any applicant, the board shall require that the applicant file with the board satisfactory evidence that his surety bond or cash deposit is in full force, unless the applicant has been relieved of the requirement as provided in this section.

3. Failure of an applicant or licensee to file or maintain in full force the required bond or to establish the required cash deposit constitutes cause for the board to deny, revoke, suspend or refuse to renew a license.

4. The amount of each bond or cash deposit required by this section must be fixed by the board with reference to the contractor's financial and professional responsibility and the magnitude of his operations, but must be not less than $1,000 or more than $50,000. The bond must be continuous in form and must be conditioned that the total aggregate liability of the surety for all claims is limited to the face amount of the bond irrespective of the number of years the bond is in force. The board may increase or reduce the amount of any bond or cash deposit if evidence supporting such a change in the amount is presented to the board at the time application is made for renewal of a license or at any hearing conducted pursuant to NRS 624.310. Unless released earlier pursuant to subsection 5, any cash deposit may be withdrawn 2 years after termination of the license in connection with which it was established, or 2 years after completion of all work authorized by the board after termination of the license, whichever occurs

later, if there is an outstanding claim against it.

5. After a licensee has acted in the capacity of a licensed contractor in the State of Nevada for not less than 5 consecutive years, the board may relieve the licensee of the requirement of filing a bond or establishing a cash deposit if evidence supporting such relief is presented to the board, but the board may at any time thereafter require the licensee to file a new bond or establish a new cash deposit as provided in subsection 4 if evidence is presented to the board supporting this requirement. If a licensee is relieved of the requirement of establishing a cash deposit, the deposit may be withdrawn 2 years after such relief is granted, if there is no outstanding claim against it.

2. NRS 624.273, which provides:

1. Each bond or deposit required by NRS 624.270 must be in favor of the State of Nevada for the benefit of any person who:

(a) As owner of the property to be improved entered into a construction contract with the contractor and is damaged by failure of the contractor to perform the contract or to remove liens filed against the property;

(b) As an employee of the contractor performed labor on or about the site of the construction covered by the contract;

(c) As a supplier or materialman furnished materials or equipment for the construction covered by the contract; or

(d) Is injured by any unlawful act or omission of the contractor in the performance of a contract.

2. Any person claiming against the bond or deposit may bring an action in a court of competent jurisdiction on the bond or against the board on the deposit for the amount of damage he has suffered to the extent covered by the bond or deposit. A person who brings action on a bond shall notify the board in writing upon filing the action. No action may be commenced on the bond or deposit 2 years after the commission of the act on which the action is based.

3. Upon receiving a request from a person for whose benefit a bond or deposit is required, the board shall notify him that:

(a) A bond is in effect or that a deposit has been made, and the amount of either;

(b) There is an action against a bond, if that is the case, and the court, the title and number of the action and the amount sought by the plaintiff; and

(c) There is an action against the board, if that is the case, and the amount sought by the Plaintiff.

4. If a surety, or in the case of a deposit, the board, desires to make payment without awaiting court action, the amount of the bond or deposit must be reduced t the extent of any payment made by the surety or the board in good faith under the bond or deposit. Any payment must be based on written claims received by the surety or board before the court action.

5. The surety or the board may bring an action for interpleader against all claimants upon the bond or deposit. If it does so, it must publish notice of the action at least once each week for 2 weeks in a newspaper of general circulation in the county where the contractor has his principal place of business. The surety or the board is entitled to deduct its costs of the action, including attorney's fees and publication, from its liability under the bond or from the deposit.

6. A claim of any employee of the contractor for labor is a preferred claim against a bond or deposit. If any bond or deposit is insufficient to pay all claims for labor in full, the sum recovered must be distributed among all claimants for labor in proportion to the amounts of their respective claims. partial payment of claims is not full payment, and the claimants may bring actions against the contractor for the unpaid balances.

7. Claims, other than claims for labor, against a bond or deposit have equal priority, except where otherwise provided by law, and if the bond or deposit is insufficient to pay all of those claims in full, they must be paid pro rata. Partial payment of claims is not full payment, and the claimants may bring actions against the contractor for the unpaid balances.

Supreme Court, U.S.
FILED

931964 MAY 31 1994

No. 93- OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1993

AMERICAN BONDING COMPANY,
Petitioner,

v.

TRUSTEES OF THE CARPENTERS FOR SOUTHERN NEVADA HEALTH AND WELFARE TRUST; TRUSTEES OF THE CONSTRUCTION INDUSTRY AND CARPENTERS JOINT PENSION TRUST FOR SOUTHERN NEVADA; TRUSTEES OF THE VACATION TRUST CARPENTERS UNION NO. 1780 AND TRUSTEES OF THE SOUTHERN NEVADA CARPENTERS AND MILLWRIGHTS APPRENTICESHIP TRAINING TRUST,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

RICHARD D. YOUNG
BELL AND YOUNG, LTD.
4001 Meadows Lane
Las Vegas, Nevada 89107
(702) 878-2800

Attorney for Petitioner

7 pp

No. 93-

In The
Supreme Court of the United States
October Term, 1993

AMERICAN BONDING COMPANY,
Petitioner,

v.

TRUSTEES OF THE CARPENTERS FOR SOUTHERN NEVADA HEALTH AND WELFARE TRUST; TRUSTEES OF THE CONSTRUCTION INDUSTRY AND CARPENTERS JOINT PENSION TRUST FOR SOUTHERN NEVADA; TRUSTEES OF THE VACATION TRUST CARPENTERS UNION NO. 1780 AND TRUSTEES OF THE SOUTHERN NEVADA CARPENTERS AND MILLWRIGHTS APPRENTICESHIP TRAINING TRUST,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

RICHARD D. YOUNG
BELL AND YOUNG, LTD.
4001 Meadows Lane
Las Vegas, Nevada 89107
(702) 878-2800

Attorney for Petitioner

SUPPLEMENTAL APPENDIX

LIONEL SAWYER & COLLINS
TODD TOUTON, ESQ.
Nevada Bar #1744
300 South Fourth Street, #1700
Las Vegas, Nevada 89101
(702) 383-8825
Attorneys for Plaintiff Trustees

DISTRICT COURT

CLARK COUNTY, NEVADA

TRUSTEES OF THE CARPENTERS FOR SOUTHERN NEVADA HEALTH AND WELFARE TRUST; TRUSTEES OF THE CONSTRUCTION INDUSTRY AND CARPENTERS JOINT PENSION TRUST FOR SOUTHERN NEVADA; TRUSTEES OF THE VACATION TRUST CARPENTERS LOCAL NO. 1780 and TRUSTEES OF THE SOUTHERN NEVADA CARPENTERS AND MILLWRIGHTS APPRENTICESHIP TRAINING TRUST,	)
Plaintiff,	)
vs.	)
AMERICAN BONDING COMPANY, BEAL'S ROYAL GLASS & MIRROR CO. and ROE and DOE DEFENDANTS I through V,	)
Defendants.	)

O R D E R

Case No. A305516
Dept. No. VI
Docket No. "B"

Defendant American Bonding Company's Motion for Summary Judgment, defendant Beal's Royal Glass & Mirror Co.'s Motion for Summary Judgment and plaintiff Trustees of the Carpenters Joint Trust Funds Countermotion for Summary Judgment against American Bonding Company all having come on for hearing on November 5, 1992 at 9:00 a.m., American Bonding Company represented by David Rosequist, Esq. of Bell & Young, Beal's Royal Glass & Mirror Co. represented by Christopher H. Byrd, Esq. of Morse & Mowbray and plaintiff Trustees of the Carpenters Joint Trust Funds represented by Todd Touton, Esq. of Lionel Sawyer & Collins, the Court having considered the written points and authorities on file herein and the arguments of counsel presented, and other good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that American Bonding Company's Motion for Summary Judgment is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Trustees Countermotion for Summary Judgment is hereby granted in favor of the plaintiff Trustees and against American Bonding Company in the amount of $20,000.00 representing the full penal limit of American Bonding Company's Bond No. 103626, together with interest hereafter at the statutory rate of eight and one-half percent (8.5%) until paid in full, together with costs incurred herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is no reason for delay in the entry of final judgment upon claims asserted by the plaintiffs against American Bonding Company and accordingly this order disposing of those claims shall be

considered final pursuant to NRCP 54(b).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that on an interlocutory basis, Beal's Royal Glass & Mirror Co's. Motion for Summary Judgment is hereby denied.

DATED this 6 day of November, 1992.

s/ JOSEPH T. BONAVENTURE
DISTRICT JUDGE

Submitted by:

LIONEL SAWYER & COLLINS

By: s/ Todd Touton
TODD TOUTON, ESQ.
Nevada Bar #1744
300 South Fourth St., #1700
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Sylvia Weber, secretary to Richard D. Young, do hereby certify that on this 3rd day of May, 1994, I forwarded a true and correct copy of the foregoing SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA, by first class mail, postage prepaid, upon:

Morris, Brignone & Pickering
300 S. Fourth Street, #1203
Las Vegas, Nevada 89101
Attorneys for Trustees

Clerk of Nevada Supreme Court
Capitol Complex
201 S. Carson Street
Carson City, Nevada 89710

Honorable Joseph T. Bonaventure
District Judge
Box 551601
Las Vegas, Nevada 89155-1601

Sylvia Weber
Sylvia Weber, Secretary

Supreme Court, U.S.
FILED
JUN 22 1994
OFFICE OF THE CLERK

(3)

No. 93-1964

In The
Supreme Court of the United States
October Term, 1993

AMERICAN BONDING COMPANY
Petitioner,

v.

TRUSTEES OF THE CARPENTERS FOR SOUTHERN NEVADA HEALTH AND WELFARE TRUST; TRUSTEES OF THE CONSTRUCTION INDUSTRY AND CARPENTERS JOINT PENSION TRUST FOR SOUTHERN NEVADA; TRUSTEES OF THE VACATION TRUST CARPENTERS UNION NO. 1780 AND TRUSTEES OF THE SOUTHERN NEVADA CARPENTERS AND MILLWRIGHTS APPRENTICESHIP TRAINING TRUST,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF IN OPPOSITION

KRISTINA PICKERING
MORRIS BRIGNONE & PICKERING
1203 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
(702) 474-9400
Attorneys for Respondents

39 pp

QUESTIONS PRESENTED

1. Nevada law requires contractors to post bonds covering claims for unpaid labor and supplies. The bonds issued in compliance with Nevada law include coverage for fringe benefits as part of their coverage for labor. One of the questions presented here is whether a compensated surety that provided such a bond can avoid liability on the fringe benefits component of its defunct principal's labor debts on the grounds that, because the entity seeking to enforce the liability is an ERISA plan, recovery is preempted by ERISA.

2. The other question presented is whether this Court should review a state court case that (a) has no precedential value because it is unpublished; (b) involves an issue that will, in all likelihood, soon be resolved by the legislature; and (c) contains unique facts limiting its precedential impact.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

TABLE OF APPENDICES vii

STATUTES INVOLVED viii

I. STATEMENT OF THE CASE 1

II. REASONS FOR DENYING WRIT OF CERTIORARI 3

A. This Court Should Deny American's Petition For Writ of Certiorari Because This Case Involves Unique Facts, Because This Case Will Have Limited Precedential Impact, and Because Legislation That Will Definitively Resolve the Very Issue Raised in This Matter Will, In All Likelihood, Soon Pass in Congress ... 3

III. THE NEVADA SUPREME COURT CORRECTLY DECIDED THE MERITS OF THIS CASE 7

A. The Claim Asserted Does Not "Relate To" An Employee Benefit Plan Within The Meaning of 11 U.S.C. § 1144(a) 7

B. American Cannot Escape Liability On Its Bond Without Violating State Laws Regulating Insurance, Which Are Exempt From ERISA Preemption In Any Event. 14

IV. CONCLUSION 15

TABLE OF AUTHORITIES

Cases **Page**

Aetna Life Ins. Co. v. Borges, 869 F.2d 142 (2d Cir.) *cert. denied*, 493 U.S. 811, 110 S.Ct. 57 (1989) 13

Anderson v. Harless, 459 U.S. 4, 103 S. Ct. 276 (1982) (STEVENS, J., dissenting) 6

Board of Education of Rogers, Arkansas v. McCluskey, 458 U.S. 966, 102 S. Ct. 276 (1982) (STEVENS, J., dissenting) 4

Genix Supply Co. v. Board of Trustees, 84 Nev. 246, 438 P.2d 816 (1968) 1, 14

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 111 S. Ct. 478 (1990) 10

Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988) 7-9, 11

Marcoz v. Summa Corp.,
106 Nev. 737, 801 P.2d
1346 (1990) 9

McCoy v. Massachusetts Inst.
of Technology, 950 F.2d 13
(5th Cir. 1991), *cert. denied*,
112 S. Ct. 1939 (1992) 7

Metropolitan Life Ins. Co. v.
Massachusetts, 471 U.S. 724,
105 S. Ct. 2380 (1985) 14, 15

Shaw v. Delta Air Lines,
Inc., 463 U.S. 85 (1983) 7, 8

Singleton v. Commission of
Internal Revenue, 439 U.S.
940, 99 S. Ct. 335 (1978) 7

State, Nevada Employment Sec.
Dep't v. Weber, 676 P.2d 1318,
100 Nev. 121 (Nev. 1984) 3

Teamsters v. United States,
431 U.S. 324 (1977) 11

Trustees of Elec. Wkrs. H.
& W. Trust v. Marjo Corp.,
988 F.2d 865 (9th Cir. 1992) 12

Watt v. Alaska, 451 U.S. 259,
101 S. Ct. 1673 (1981) (STEVENS,
J., concurring) 5

Statutes

11 U.S.C. § 1144 7

29 U.S.C. § 1001 1

29 U.S.C. § 1132 . . . . . 8, 10

29 U.S.C. § 1144 . . . . . 7, 9, 14

29 U.S.C. § 1145 10

NRS 624.270 . . . . . 1, 9, 13, 14, 16

NRS 624.273 . . . . . 1, 9, 13-16

NRS 691.030 16

NRS 691A.010 16

NRS 691B.010 . . . . . 6, 14

NRS 691B.030 . . . . . 6, 15

Other

Georgia Code section 18-4-22.1 8

H.R. Rep. No. 96-889(II) (Ways and Means Committee), 96 Cong. 1st Sess., reprinted in 1980 USCCAN 2993-3066 at 3037-3038 11

H.R. Rep. No. 533, 1974 USCCAN at 4655 11

Kennedy Gives Strong Endorsement of Bill that Would Pre-Empt ERISA, BNA Daily Labor Report, March 14, 1994 5

Nevada Supreme Court Rule 123 3

S. Rep. No. 127, 1974 USCCAN at 4871 11

Senate Panel Clears Bill to Bar State Prevailing Wage Laws from ERISA, vol. 21, no. 16, BNA Pension & Benefits Reporter, p. 771 (April 18, 1994) 5

TABLE OF APPENDICES

APPENDIX

A. Senate Bill 1580

B. The Bureau of National Affairs, Inc., DAILY LABOR REPORT, MARCH 14, 1994, 1994 DLR 48 d18

C. The Bureau of National Affairs, Inc., BNA Pension & Benefits Reporter, Vol. 21, No. 16; Pg. 771, April 18, 1994

STATUTES INVOLVED

This case involves the following statutes:

1. 29 USC § 1132(d)(1) which provides as follows:

> An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

2. 29 USC § 1144(a), which provides as follows:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

3. 29 USC § 1144(b)(2)(A), which provides as follows:

> Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

4. NRS § 691 B.010, which provides as follows:

> All contracts of surety insurance covering subjects located or to be performed in this state are subject to the applicable provisions of chapter 687B of NRS (the insurance contract), and to other applicable provisions of this code. (1971, p. 1779.)

5. NRS § 691B.030, which provides as follows:

> Any insurer which executes any surety contract as surety shall be estopped, in any proceeding to enforce the liability which it has assumed to incur, to deny its power to execute such contract or assume such liability. (1971, p. 1780.)

I.
STATEMENT OF THE CASE

The Nevada legislature has recognized that small contractors often underbid construction jobs in the hope of getting work and then find themselves unable to pay their workers. Many contractors declare bankruptcy. In response to this recurring problem, the Nevada legislature enacted the statutes here at issue. NRS 624.270 and 624.273 require contractors to post bonds covering claims for unpaid labor and supplies.[1] Bonds issued in compliance with these statutes include coverage for fringe benefits as part of their coverage for labor. *Genix Supply Co. v. Board of Trustees*, 84 Nev. 246, 438 P.2d 816 (1968).

Respondents are the Trustees of multi-employer Southern Nevada Carpenters Trust Funds ("Trustees").[2] The funds provide health, welfare, and pension benefits to individuals employed in the Southern Nevada construction industry. The plans the Trustees administer are qualified under the Employment Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA").

---

[1]NRS 624.270 and 624.273 are set out in the appendix to the petition for writ of certiorari, at Appendix C, pages 1-6. All references to the petition for writ of certiorari in this case will be abbreviated "Petition" followed by the pages(s) cited.

[2]Pursuant to Rule 29.1, respondents Trustees of the Carpenters for Southern Nevada Health and Welfare Trust; Trustees of the Construction Industry and Carpenters Joint Pension Trust for Southern Nevada; Trustees of the Vacation Trust Carpenters Union No. 1780; and Trustees of the Southern Nevada Carpenters and Millwrights Apprenticeship Training Trust (together "Trustees"), state as follows: the Trustees are not a corporation.

On May 4, 1990, American issued a $20,000.00 standard form Nevada contractor's surety bond to secure labor, materialmen's, and suppliers' debts incurred by National Forest Products, Inc. ("Forest"), a Nevada contractor. Forest executed a collective bargaining agreement, requiring it to make contributions to Trustees based on the hours its employees worked. Pursuant to the collective bargaining agreement, Forest submitted remittance reports to Trustees for the months of January through July 1991, but it failed to make any payment for the time on those reports. Forest filed for Chapter 11 protection under the United States Bankruptcy Code on November 26, 1991. Trustees brought a claim against American for the amount of the surety bond.

American moved for summary judgment, asserting that ERISA preemption defeated the Trustees' claims against it. Trustees responded and countermoved for summary judgment in their own right. On November 6, 1992, the lower state court issued an Order and Judgment granting Trustee's countermotion for summary judgment against American. The order declared American's $20,000 bond forfeit.

American appealed the decision to the Nevada Supreme Court. On January 20, 1994, the Nevada Supreme Court entered an order dismissing American's appeal. The Nevada Supreme Court concluded that the Nevada statutes at issue were "only remotely related to ERISA and are therefore not preempted by ERISA in cases such as the one at bar." The Nevada Supreme Court order remains unpublished. By order dated March 7, 1994, the Nevada Supreme Court denied rehearing.

II.
REASONS FOR DENYING WRIT OF CERTIORARI

A. This Court Should Deny American's Petition For Writ of Certiorari Because This Case Involves Unique Facts, Because This Case Will Have Limited Precedential Impact, and Because Legislation That Will Definitively Resolve the Very Issue Raised in This Matter Will, In All Likelihood, Soon Pass in Congress.

The Nevada Supreme Court order of which American Bonding complains remains unpublished. Because the order is unpublished, the case has no precedential impact whatsoever within the Nevada state court system. Nevada Supreme Court Rule 123 provides:

> An unpublished opinion or order of the Nevada Supreme Court shall not be regarded as precedent and shall not be cited as legal authority except when the opinion or order is (1) relevant under the doctrines of law of the case, res judicata or collateral estoppel; or (2) relevant to a criminal or disciplinary proceeding because it affects the same defendant or respondent in another such proceeding.

Moreover, the Nevada Supreme Court takes the prohibition on citing unpublished orders seriously. In *State, Nevada Employment Sec. Dep't v. Weber*, 100 Nev. 121, 124, 676

P.2d 1318, 1320 (Nev. 1984), the Court chastised an attorney who cited unpublished orders and warned:

> ... in the future, when this court perceives a lack of regard for its rules or decisions, we may well impose sanctions such as striking a brief, dismissing an appeal, or finding a confession of error. Additionally, the attorneys involved may be referred to the bar for discipline.

Because this case is unpublished, no other party can rely on its holding, and the case can create no future conflict with any other decision, whether state or federal. Therefore, review of the Nevada Supreme Court's order would be of immediate importance *only* to the parties involved. And "[t]o remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." *Board of Education of Rogers, Arkansas v. McCluskey*, 458 U.S. 966, 971, 102 S. Ct. 276, 280 (1982) (STEVENS, J., dissenting).

A second factor militating against a grant of certiorari is that legislation which will directly address the very question that American here presents is now making its way through Congress. Senate Bill 1580, introduced by Senator Arlen Specter, would definitively resolve this issue in favor of the Trustees by exempting from ERISA preemption "any provision of State law to the extent that such provision provides for a mechanics' lien or other lien, bonding, or other security for the collection of delinquent

contributions to a multi-employer plan."[3] The House of Representatives has already passed a similar bill by a vote of 276 to 150. *See Kennedy Gives Strong Endorsement of Bill that Would Pre-Empt ERISA*, BNA Daily Labor Report, March 14, 1994.[4]

Senate Bill 1580 has every indication of passing within the next few months. During committee hearings, Senator Edward Kennedy, chairman of the Labor and Human Resources Committee, "stressed the importance of expediting the passage of the bill by the Senate because recent court decisions in many states 'have gone far beyond the original intent of ERISA, and vastly extended the reach of the preemption provision.'" *See Senate Panel Clears Bill to Bar State Prevailing Wage Laws from ERISA*, vol. 21, no. 16, BNA Pension & Benefits Reporter, p. 771 (April 18, 1994).[5] Supported by the Clinton Administration, the bill was favorably reported out of the Senate Committee on Labor and Human Resources.

This Court should not devote its scarce resources to resolving an issue that Congress is close to addressing in a definitive manner. As was recognized in *Watt v. Alaska*, 451 U.S. 259, 274, 101 S. Ct. 1673, 1682 (1981) (STEVENS, J., concurring), this Court should take into consideration the likelihood that Congressional action is forthcoming in deciding whether to grant a petition of certiorari. In his concurrence in the *Watt* decision, Justice Stevens noted that certain issues are "clearly a matter for

---

[3]Senate bill 1580 is set out in the appendix.

[4]This Daily Labor Report article is set forth in the appendix.

[5]This article is set out in the appendix.

Congress to decide," and he added, "If Congress is displeased with the decisions of this Court and the Court of Appeals, it may promptly reverse them by revising the relevant statutes. If that is its view, it no doubt would have acted more promptly if we had simply denied certiorari." *Id.*

Further, once passed, the proposed legislation would render any decision the Court made in this matter meaningless by robbing the decision of all precedential value. This Court must not spend its limited time and energy issuing an opinion that "in no way promotes the development of the law." *Anderson v. Harless*, 459 U.S. 4, 12, 103 S. Ct. 276, 280 (1982) (STEVENS, J., dissenting).

Finally, if this Court were inclined to hear a case involving ERISA preemption, certain factors of this case minimize its precedential value. This case, which, in part, involves the issue of whether the two Nevada statutes fall under the ERISA insurance exception, is uncharacteristic of most cases involving ERISA preemption.

The issue of ERISA's insurance exception is more fully discussed below. Briefly, surety bonds are a form of insurance contracts under Nevada law, NRS 691B.010, whose validity Nevada insurers are estopped to deny. NRS 691B.030. American's duty to honor its assurances represents state "law which regulates insurance." Trustees' right to make claim against American based on its bond and the law applicable to its undertaking thus fall within ERISA's insurance exemption.

Justice Stevens, in a rare opinion supporting the denial of a petition for certiorari, stated that he "consider[ed] it entirely appropriate to disfavor complicated cases which turn largely on unique facts. A series of

decisions by the courts of appeals may well provide more meaningful guidance to the bar than an isolated or premature opinion of this Court." *Singleton v. Commission of Internal Revenue*, 439 U.S. 940, 945, 99 S. Ct. 335, 339 (1978).

III.
THE NEVADA SUPREME COURT CORRECTLY DECIDED THE MERITS OF THIS CASE

A. The Claim Asserted Does Not "Relate To" An Employee Benefit Plan Within The Meaning of 11 U.S.C. § 1144(a).

If this Court grants the petition for certiorari, then it should affirm the order of the Nevada Supreme Court. The order does not conflict with any "decision of another state court of last resort or of a United States court of appeal." Rule 10. In fact, the order of the Nevada Supreme Court comports with the principles established by other courts and by Congress itself in enacting ERISA.

While ERISA broadly preempts state laws that "relate to any employee benefit plan" covered by it (29 U.S.C. § 1144(a)), this preemption is "not limitless." *McCoy v. Massachusetts Inst. of Technology*, 950 F.2d 13, 17 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1939 (1992). "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983).

The central case in this area of ERISA preemption is *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486

U.S. 825 (1988). At issue in *Mackey* were two Georgia garnishment statutes. The first specifically barred garnishment of "[f]unds or benefits of a pension, retirement, or employee benefit plan or program subject to [ERISA]." The second was Georgia's general garnishment statute, silent with respect to ERISA, which Georgia's courts applied to allow creditors to reach benefits due employees under ERISA-protected plans. This Court invalidated the specific, protective statute as preempted by ERISA, but upheld Georgia's general garnishment law, minus the exemption, as applicable to employee benefit plans and *not preempted.*

Mackey quoted *Shaw* in striking down the specific, protective statute: "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with *or reference* to such a plan." *Mackey*, 486 U.S. at 829 (quoting *Shaw*, 463 U.S. at 96-97; *Mackey* Court's emphasis). Georgia Code section 18-4-22.1 by its terms "single[d] out ERISA employee welfare benefit plans." (*Id.*), and under *Shaw*, this "singling out" was fatal. *Mackey*, 486 U.S. at 838 n.12.

As noted, this Court, in *Mackey*, upheld Georgia's general garnishment laws, though applied by Georgia's courts to reach benefits due under ERISA benefit plans. It did so based on its determination of the intent of the Congress that enacted the original Employment Retirement Income Security Act of 1974. *Mackey*, 486 U.S. at 840. Elsewhere in that statute, the 1974 Congress gave ERISA plans the power to "sue or be sued," 29 U.S.C. § 1132(d)(1). Georgia's general garnishment laws, though burdensome to plan fiduciaries, merely provide a means of collecting judgments applicable to all creditors and all assets generally and are a necessary procedural incident to

the plans' power to sue and be sued. *Mackey*, 486 U.S. at 834, n.10. While garnishing benefits due under an ERISA plan brings Georgia's garnishment statutes into contact with Georgia-based ERISA plans, such contact is too general in application and remote in effect to be said to "relate to" an ERISA plan. This Court therefore rejected preemption as to Georgia's general garnishment laws.

In this case, American voluntarily undertook to issue Forest a contractor's bond. The bond, by its terms, protects creditors of American's principal, Forest, and the Trustees are such creditors. None of the statutes involved "single out" ERISA plans; nor do they impose a liability beyond that which American affirmatively undertook. Instead, the statutes refer to "labor" generically. Automatic preemption, like that found to exist in *Mackey* with respect to Georgia's specific garnishment statute, thus does not arise. The Trustees' right to make demand on and to enforce American's obligations under its bond are not preempted by ERISA, 29 U.S.C. § 1144(a).

In fact, if the Nevada Supreme Court had ruled in favor of American, it would have, in essence, exempted ERISA plans from the benefits of Nevada's contractor licensing statutes. Such an exemption would have impermissibly "singled out" ERISA plans. As American recognizes, "Under ERISA, the term 'state law' is defined broadly enough to encompass 'almost any imaginable legislative, judicial, or administrative action a state might take.'" Petition, p. 8, quoting *Marcoz v. Summa Corp.*, 106 Nev. 737, 743, 801 P.2d 1346, 1350 (1990). A decision by the Nevada Supreme Court to exclude only ERISA plans from the class of beneficiaries of NRS 624.270 and 624.273 would have unlawfully "related to" an ERISA plan. Under such a ruling, individual workers could pursue American for

the compensation Forest promised them, but ERISA plans would be precluded from bringing a similar action. Under ERISA's preemption provision, which prohibits state courts from issuing decisions that single out ERISA plans for special treatment, the Nevada Supreme Court could not have ruled in American's favor.

"[T]he question of whether a certain state statute is preempted by federal law is one of congressional intent," making "[t]he purpose of Congress ... the ultimate touchstone." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137, 138, 111 S. Ct. 478, 482 (1990). An inquiry into legislative intent demonstrates that Congress did not intend that surety obligations such as American's would be preempted by ERISA.

As originally enacted, the civil enforcement section of ERISA only provided for equitable proceedings. No federal cause of action to recover money judgments from delinquent employers existed. Because the absence of *any* action to collect money judgments would destroy ERISA's fundamental purpose to protect employee benefit rights, Congress could not have intended to preclude such causes of action under state law.

In 1980, Congress added provisions establishing a federal cause of action to recover delinquencies. 29 U.S.C. §§ 1145, 1132(g). However, this Court has emphasized that in interpreting the preemption clause of ERISA, the relevant congressional intent is the intent of the Congress that enacted the preemption clause. "We must look at the language of ERISA and its structure, to determine the intent of the Congress that originally enacted the provision in question. 'It is the intent of the Congress that enacted [the

section] ... that controls.'" *Mackey*, 486 U.S. at 840, citing *Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977).

The Senate and House committees considering the original Act both stated:

> The enforcement provisions have been designed specifically to provide both the Secretary [of Labor] and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act. *The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts* and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants....

H.R. Rep. No. 533, 1974 USCCAN at 4655; S. Rep. No. 127, 1974 USCCAN at 4871 (emphasis added). The reference to "the full range of legal and equitable remedies available in both state and federal courts" would be meaningless, given ERISA's original limitation of ERISA-based remedies to equitable enforcement, had Congress intended collection suits like that at issue here to be barred.

The legislative history underlying the 1980 amendments to ERISA again clearly expresses Congress's desire to retain state law remedies in appropriate circumstances. In fact, the 1980 amendment was only intended to preclude state law remedies that provided for *lesser* damages than those provided for by Congress. Thus, H.R. Rep. No. 96-889(II) (Ways and Means Committee), 96

Cong. 1st Sess., reprinted in 1980 USCCAN 2993-3066 at 3037-3038, states:

> The Bill preempts any state or other law which would prevent the award of reasonable attorney's fees, court costs or liquidated damages, or which would limit liquidated damages to an amount below the 20 percent level. However, the Bill does not preclude the award of liquidated damages in excess of the 20 percent level where an award of such a higher level of liquidated damages is permitted under applicable state or other law. *The Committee amendment does not change any other type of remedy permitted under state or federal law with respect to delinquent multi-employer plan contributions.*

(Emphasis added.)

American cites *Trustees of Elec. Wkrs. H. & W. Trust v. Marjo Corp.*, 988 F.2d 865 (9th Cir. 1992), and claims that the Nevada Supreme Court's order in this case conflicts with certain statements made by the *Marjo* court. However, *Marjo* involved facts entirely different from those present in this case. In *Marjo*, the court held that ERISA preempts application of a statute that holds general contractors responsible for the ERISA plan contributions that subcontractors fail to make on behalf of their employees. The court emphasized that under the statute "Grant [the general contractor] has had to defend itself against the suit for contributions as if *it* and not Desert Valley [the subcontractor] were the employer contractually bound to the Plans." *Marjo*, 988 F.2d at 866 (emphasis in *Marjo*).

In contrast, sureties such as American who, for a premium, voluntarily undertake to insure specific obligations of a contractor, are not "employers" or "fiduciaries" within ERISA's coverage but ordinary promissors, whose voluntarily assumed obligations are fully enforceable under applicable state law. State law does not require American to "defend itself against the suit for contributions as if it ... were the employer...." Instead, American is liable to Trustees because, as a surety, it voluntarily assumed Forest's obligations. The mere fact that Trustees administers an ERISA plan does not preclude its claim. American is liable to Trustees the same way that American would be liable to any other creditor of Forest.

The Nevada contractor licensing statutes at issue here do not attempt to affect the primary administrative functions of ERISA benefit plans. NRS 624.270 and NRS 624.273 merely permit recovery of wage claims from a compensated surety who agreed to pay them on its principal's default; they do not try to determine employer eligibility for fringe benefits, to increase fringe benefits, or to impose liability on one who does not undertake it voluntarily. The amount, terms, conditions and every other aspect of the pre-existing obligation to pay contributions to the plan remain exactly as the employer and the union agreed. The statutes in question only put employee benefit plans on an equal footing with all other wage claimants, who are entitled to recover their full wage. *See Aetna Life Ins. Co. v. Borges*, 869 F.2d 142 (2d Cir.) *cert. denied*, 493 U.S. 811, 110 S. Ct. 57 (1989) (a state statute changing the payee but not affecting the calculation of benefits is not preempted).

B. American Cannot Escape Liability On Its Bond Without Violating State Laws Regulating Insurance, Which Are Exempt From ERISA Preemption In Any Event.

There exists an even simpler answer to the preemption question American has raised. The insurance exemption stated in 29 U.S.C. § 1144(b) leaves the States free to enforce laws regulating insurance whether the laws "relate to" an ERISA plan or not.

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 105 S. Ct. 2380 (1985), is very nearly on point. At issue in *Metropolitan Life* was a statute mandating minimum mental-health-care benefits in all group health policies, including ERISA plan policies. The insurers in *Metropolitan Life* objected to the statute mandating the objectionable coverages and declaratory judgment proceedings were brought to decide the question. This Court found the law mandating the additional coverage "related to" the administration of ERISA plans and so was preempted under 29 U.S.C. § 1144(a). However, it went on to find the state statute mandating the coverage to be a law regulating insurance within the meaning of 29 U.S.C. § 1144(b)(2)(A), and upheld the Massachusetts statute on that basis.

American posits NRS 624.270 and NRS 624.273, as interpreted in *Genix Supply*, as in effect mandating coverage for Nevada contractors' ERISA plan contributions. Accepting this characterization, *arguendo*, as accurate, American's ERISA preemption argument fails under *Metropolitan Life*. By statute, Nevada makes contracts of surety insurance no different from any other contract of insurance and fully subject to its insurance code. NRS

691B.010. If Nevada's contractors' bond statutes "relate to" ERISA plans, it is only by reason of the coverages they mandate. Laws mandating certain coverages comprise the "business of insurance" under *Metropolitan Life* and are exempt from the preemption debate.

Nevada's Insurance Code provided a proper basis for the Nevada Supreme Court's order:

> Any insurer which executes any surety contract as surety shall be estopped, in any proceeding to enforce the liability which it has assumed to incur, to deny its power to execute such contract or assume such liability.

NRS 691B.030. American has taken Forest's money, issued the bond, and let creditors, including Trustees, rely on the bond. It cannot now complain that the coverages it mandatorily includes under NRS 624.273 are preempted by ERISA and therefore not available.

IV.
CONCLUSION

This Court should not devote its limited resources to reviewing this matter. The Nevada Supreme Court order at issue remains unpublished and will create no future conflict with any case, whether state or federal. Any conflict that may exist will be limited to the parties involved. This Court has expressed its desire to review only those cases that will have an impact far beyond the parties involved. Moreover, Congress will soon take definitive action on the very issue present in this matter. Once Congress passes Senate Bill 1580, any decision in this case will lose all

precedential value. Also, the insurance exception issue present in this case makes it a bad vehicle for this Court to clarify the scope of ERISA preemption. The unique facts present in this case will limit whatever precedential impact a decision by this Court may have.

If this Court decides to grant certiorari, it should affirm the Nevada Supreme Court's order because the order comports with other federal case law in this area and with Congressional intent. American is a compensated surety who voluntarily undertook the obligation it now seeks to avoid. No provision of ERISA prohibits an ERISA plan from collecting sums contractually due on a voluntarily issued surety bond. An attempt to collect such a sum does not raise a legitimate preemption claim. In fact, any state court decision that exempted ERISA plans from benefitting under the contractor licensing statutes would violate the ERISA preemption provision by "singling out" ERISA plans for special (and detrimental) treatment. ERISA's legislative history demonstrates that Congress intended to retain, for ERISA plans, state remedies that facilitate recovery of delinquent contributions. Further, if NRS 624.270 and 624.273 are seen as "related to" ERISA plans because of the coverages they mandate, they and the related provisions of Nevada's insurance code, NRS 691A.010 and 691.030, are triggered, and with them, ERISA's exemption of state

laws regulating insurance from its broad preemption provision.

DATED this 22nd day of June, 1994.

Respectfully submitted,

MORRIS BRIGNONE & PICKERING
1203 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

By _____
Kristina Pickering

Attorneys for Respondents

Trustees of the Carpenters for Southern Nevada Health and Welfare Trust; Trustees of the Construction Industry and Carpenters Joint Pension Trust for Southern Nevada; Trustees of the Vacation Trust Carpenters Union No. 1780; and Trustees of the Southern Nevada Carpenters and Millwrights Apprenticeship Training Trust

APPENDIX A

103d Congress
1st Session

S. 1580

To provide that the Employee Retirement Income Security Act of 1974 does not preempt certain State laws, and for other purposes.

IN THE SENATE OF THE UNITED STATES

October 21 (legislative day, October 13), 1993
Mr. Specter introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

---

A BILL

To provide that the Employee Retirement Income Security Act of 1974 does not preempt certain State laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. ERISA PREEMPTION RULES NOT TO APPLY TO CERTAIN ADDITIONAL STATE LAWS.

Section 514(B) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1144(b)) is amended by adding at the end the following new paragraph:

"(9) Subsection (a) shall not apply to--

"(A) any provision of State law to the extent that such provision requires the payment of prevailing wages, including employee benefits, on public projects and permits any prevailing employee benefit plan contribution or cost requirement of such law to be met by crediting--

"(i) the payment of employee benefit plan contributions or costs,

"(ii) the payment of wages in lieu of such contributions or costs, or

"(iii) the payment of a combination of wages and such contributions or costs;

except that this subparagraph shall not be construed to exempt from subsection (a) any such provision to the extent it otherwise mandates the maintenance of, or otherwise regulates the benefits or operations of, any employee benefit plan;

"(B) any provision of State law to the extent that such provision--

"(i) establishes minimum standards for the certification or registration of apprenticeship or other training programs,

"(ii) concerns the establishment, maintenance, or operation of a certified or registered apprenticeship or other training program, or

"(iii) makes certified or registered apprenticeship or other training an occupational qualification,

and does not conflict with any right, requirement, or duty established under this title; or

"(C) any provision of State law to the extent that such provision provides for a mechanics' lien or other lien, bonding, or other security for the collection of delinquent contributions to a multiemployer plan.".

SEC. 2. EFFECTIVE DATE.

The amendment made by section 1 shall take effect on the date of the enactment of this Act and shall apply to matters with respect to which actions are pending on or after such date.

APPENDIX B

1ST REFERENCE of Level 1 printed in FULL format.

Copyright 1994 The Bureau of National Affairs, Inc.,DAILY LABOR REPORT

MARCH 14, 1994

1994 DLR 48 d18

LENGTH: 585 words

SECTION: CURRENT DEVELOPMENTS.

TITLE: KENNEDY GIVES STRONG ENDORSEMENT OF BILL THAT WOULD PRE-EMPT ERISA.

TEXT:

Senate Labor and Human Resources Committee Chairman Sen. Edward Kennedy (D-Mass) March 10 said his panel will move quickly to approve a bill that would give states authority to set prevailing wages and certain apprenticeship training standards on publicly funded projects without being subject to pre-emption by the Employee Retirement Income Security Act.

The measure (S 1580) picked up the endorsements of Sen. Harris Wofford (D-Pa) and Kennedy, who said ERISA's pre-emption of such authority "is like an axe held over the necks of working men and women." The bill (HR 1036) passed the House Nov. 9 by a vote of 276 to 150 (216 DLR A-8, 11/10/93).

During a committee hearing on the Senate measure March 10, proponents of the bill said ERISA's pre-emptive authority has taken away the states' right to mandate a

minimum wage for public works projects or to govern apprenticeship and education programs.

Sen. Arlen Specter (R-Pa), who sponsored the bill with Sen. Alfonse D'Amato (R-NY), testified that prevailing wage laws, which are in effect in 31 states "protect local wage standards, promote fair competition among bidders, and maintain quality work standards for public works projects."

Kennedy and Specter also contended that prevailing wage laws existed long before the enactment of ERISA. "Recent court decisions that have upheld ERISA's preemptive authority over state prevailing wage laws defy logic and are unwarranted and unjustified," according to Kennedy.

Bill Would Exempt Mechanics' Lien Laws

The bill also proposes to exempt state mechanics' lien laws, which grant individuals who perform services a lien on the property to secure payment for their work. The mechanics' liens and other similar remedies are a means for collecting delinquent contributions to multiemployer plans.

Supporters of the bill include the AFL-CIO, the Labor Department, and the National Association of State Apprenticeship Directors.

State prevailing wage laws guarantee that workers performing public work do not have to accept wages below the rate paid to workers on private worksites in the same locality, according to John Hudacs, commissioner of the New York State Department of Labor, who testified on

behalf of the National Association of Government Labor Officials.

Those who testified against the bill said ERISA's pre-emptive authority allows employers to provide a uniform set of benefit plans for their workers without being subject to varying and often conflicting state laws.

Mark Thierman, of Thierman Law Partnership of San Francisco, Calif., who testified on behalf of the Associated Builders and Contractors, said "Construction industry employers, both union and nonunion, offer a wide variety of benefits to their employees. The successful administration of these benefits would be severely handicapped if construction employers were subjected to divergent state and local regulations of these benefit plans."

Other critics of the bill say the proposal would allow states to establish discriminatory restrictions on competing nonunion training programs. - Theirman said union-controlled state apprenticeship councils would have complete authority to refuse to certify qualified open shop programs.

Leo Garcia, who spoke on behalf of The Associated General Contractors of America, said removing ERISA's pre-emption mandate would further "exacerbate the competitive disadvantage of the open shop sector of the construction industry on prevailing wage projects."

LANGUAGE: ENGLISH

APPENDIX C

3RD REFERENCE of Level 1 printed in FULL format.

Copyright 1994 The Bureau of National Affairs, Inc.
BNA Pension & Benefits Reporter

Vol. 21, No. 16; Pg. 771

April 18, 1994.

LENGTH: 422 words

SECTION: NEWS QUALIFICATION: Preemption.

TITLE: SENATE PANEL CLEARS BILL TO BAR STATE PREVAILING WAGE LAWS FROM ERISA.

TEXT:

The Senate Labor and Human Resources Committee approved a bill April 13 that would give states authority to set prevailing wages and certain apprenticeship training standards on publicly funded projects without being subject to preemption by the Employee Retirement Income Security Act.

The committee cleared the bill (S 1580, HR 1036) by a vote of 10 to 7. In a statement released at the hearing, committee Chairman Edward Kennedy (D-Mass) stressed the importance of expediting the passage of the bill by the Senate because recent court decisions in many states "have gone far beyond the original intent of ERISA, and vastly extended the reach of the preemption provisions."

ERISA was enacted in 1974 to apply a national standard to protect workers' health and welfare benefits.

The law preempts state laws relating to employee benefit plans.

During a committee hearing on the measure March 10, Kennedy said court decisions that have upheld ERISA's preemptive authority over state prevailing wage laws "defy logic and are unwarranted and unjustified" (20 BPR 552).

State prevailing wage laws, in effect in 31 states, have been successfully challenged and overturned in New York and Washington, Kennedy said in his statement. In Pennsylvania, Oklahoma, California, and Montana, they have been overturned in lower courts, and decisions in higher courts are pending, he added.

The bill also would allow states to set standards for apprenticeship training programs, which have been preempted by ERISA in recent court decisions in California, Minnesota, and Oklahoma, Kennedy said.

Congress intended ERISA to regulate the disclosure and reporting requirements of their programs, "but we did not intend to interfere with the long-established federal-state joint partnership regulating state apprenticeship programs," according to Kennedy.

The bill also would exempt from ERISA preemption state mechanics' lien laws, which grant individuals who perform services a lien on property to secure payment for their work. The mechanics' liens and other similar remedies are a method of collecting delinquent contributions to multiemployer plans.

Supporters of the ERISA bill include the AFL-CIO, the Labor Department, and the National Association of State Apprenticeship Directors.

Opponents of the bill, including the National Association of Manufacturers, say ERISA's preemptive authority allows employers to provide a uniform set of benefits for their workers without being subject to varying and often conflicting state laws.

LANGUAGE: ENGLISH